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September 1, 2006

Mary L. Cottrell, Secretary
Department of Telecommunications & Energy
Commonwealth of Massachusetts
One South Station, 2nd Floor
Boston, Massachusetts 02110

Re: DTE 06-56 – Petition of Charter Fiberlink MA-CCO, LLC for Arbitration of an Interconnection Agreement

Dear Secretary Cottrell:

Enclosed for filing in the above-referenced matter is Verizon Massachusetts' Appeal of Arbitrator's Ruling Denying Motion to Dismiss and Request to Strike. Verizon respectfully requests that the Department rule on this appeal expeditiously since the hearing in the matter is now scheduled for September 19.

Thank you for your assistance in this matter.

Sincerely,

Alexander W. Moore (kmo)

Alexander W. Moore

cc: Carol Pieper, Arbitrator
DTE 06-56 Service List

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

In the Matter of Petition for Arbitration of an Interconnection Agreement Between Charter Fiberlink MA-CCO, LLC, and Verizon-Massachusetts Inc.	Docket No. 06-56

VERIZON MASSACHUSETTS APPEAL OF ARBITRATOR'S RULING DENYING MOTION TO DISMISS AND REQUEST TO STRIKE

Introduction and Summary

Verizon Massachusetts, pursuant to 220 C.M.R. § 1.06(6)(d)(3), respectfully appeals the Arbitrator Ruling on Motion to Dismiss and Request to Strike Filed by Verizon Massachusetts issued August 25, 2006 ("Ruling"). The Ruling improperly allows Charter Fiberlink MA-CCO, LLC ("Charter") to arbitrate issues that were closed during the parties' negotiations or were never raised during the parties' negotiations. The Ruling also improperly allows Charter to arbitrate issues that were not filed in this proceeding until 34 days after Charter first filed its arbitration petition.

The Ruling is inconsistent with the negotiation and arbitration process established in Section 252 of the Telecommunications Act of 1996 ("the Act"). Section 252 requires carriers to attempt in good faith to negotiate the terms of an interconnection agreement and, if any issues remain unresolved, provides that "the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues." 47 U.S.C. § 252(b)(1). But the Ruling

disregards the Act's mandatory negotiation process. It finds that a petitioner can declare any issue "open" at the time it files its petition because "the parties have not submitted an interconnection agreement in writing for approval by the Department." Ruling at 3, 4. Under the Ruling, it makes no difference what happened during the negotiations, or if negotiations occurred at all, because in the absence of a filed interconnection agreement, "the Arbitrator cannot find that the issues raised by Charter have been previously resolved." Ruling at 4.

Arbitration, however, is only available to resolve issues that remain open after the parties' have negotiated in good faith. It is not a process by which a carrier can reopen issues that were closed during the negotiations or raise new issues for the first time that were never raised during the negotiations. Nor is it a process in which the petitioner can raise new issues after it files its petition. The Department should reverse the Ruling and dismiss Charter's arbitration petition.

Background

Verizon began negotiating fiber meet amendments for a number of states with Charter in the middle of last year. Throughout these negotiations, Verizon and Charter held conference calls and exchanged drafts of the fiber meet amendment. Verizon received Charter's final proposed fiber meet amendment on March 16, 2006. *See* Response of Verizon Massachusetts, Exhibit 1, filed July 18, 2006 ("Verizon MA Response") (copy attached). Charter's proposed changes are shown in blue and changes previously proposed by Verizon are shown in red. In the e-mail accompanying Charter's final proposed amendment, Charter's negotiator indicated that "[y]ou can see *all* of our [Charter's] changes in the format originally provided by Verizon in the second document labeled 'Charter-Fiber Mt Amdt-Draft 031606.'" *Id.* (emphasis supplied). Only Section 2.1 of Charter's final proposed amendment contained any changed or modified

contract language. All other sections of Charter's final proposed amendment were unchanged and therefore reflected Charter's agreement on the contract language it proposed in those sections.

Verizon sent Charter its final proposed fiber meet amendment on May 8, 2006. *See* Verizon MA Response, Exhibit 2. Verizon's proposed changes to the contract language of the amendment are shown in red. Verizon's final proposed amendment showed changes to the language in Section 2.1, plus a cross-reference to Section 2.1 in Section 2.2 and a minor wording change in Section 2.4. The other sections of Verizon's final proposed amendment were unchanged and reflected the parties' agreement on the language in those sections.

On June 22, 2006, Charter filed its Petition for Arbitration.[1] In Exhibit B of the Charter Petition, Charter included a new proposed fiber meet amendment that Charter never provided to Verizon during the parties' negotiations. *See* Charter Petition, Exhibit B. Charter's new proposed amendment was substantially different from the final proposed amendment Charter provided to Verizon during negotiations. For example, while Charter's final proposed amendment in negotiations only had changes to contract language in Section 2.1, Charter's new proposed amendment has changes in many other sections, including the last "Whereas" clause, the heading of Section 2, Section 2.2, Section 2.3, Section 2.4, as well as Sections 2.1, 4, 4.1, 4.2, 4.3, 6.3, and 7.4 of Exhibit A of the amendment. *Compare* Exhibit 1 attached to Verizon MA Response with Exhibit B of the Charter Petition.

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[1] Petition of Charter Fiberlink MA-CCO, LLC for Arbitration of an Amendment to the Interconnection Agreement Between Verizon-Massachusetts Inc. and Charter Fiberlink MA-CCO, LLC Pursuant to Section 252 of the Communications Act of 1934, as Amended filed June 22, 2006 ("Charter Petition").

On July 18, 2006, Verizon filed its Response to Charter Petition for Arbitration and Verizon's Motion to Dismiss.[2] Verizon MA showed that Charter and Verizon had proposed to each other identical or nearly identical contract language with respect to each issue as identified in Charter's Petition. *See* Verizon MA Response at 6-22.[3] The Parties had thus agreed on and closed all of these issues, as raised in the Charter Petition, by their exchange of identical or nearly identical contract language.[4] During the negotiations, neither party withdrew its final proposed contract language or indicated that issues were open despite the parties' apparent agreement on contract language governing such issues.

On July 26, 2006, Charter filed a "Supplement" to its Petition for Arbitration.[5] Charter's Supplement raised three new issues (*i.e.*, 5(b), 5(c) and 5(d)) and included yet another new draft fiber meet amendment that changed language in the draft amendment included with Charter's Petition. These new issues were never discussed with Verizon during negotiations and Charter's new proposed contract language was never provided to Verizon during negotiations.

On August 2, 2006, Verizon MA replied to Charter's Supplement.[6] In its Reply, Verizon MA asked the Arbitrator to "strike the new issues raised in Charter's Supplement because they were untimely." Verizon MA Reply at 2 (copy attached). Charter's Supplement had been filed

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2 Response of Verizon Massachusetts filed July 18, 2006 ("Verizon MA Response"); Verizon Massachusetts Motion to Dismiss filed July 18, 2006 ("Verizon MA Motion to Dismiss").

3 Ironically, Charter's Petition failed to identify as open the few, minor issues that the parties had not in fact resolved in negotiations.

4 Where the parties had proposed nearly identical contract language to each other, the minor differences between their respective proposals either did not relate directly to any issue raised by Charter or reflected a much narrower issue than had been raised by Charter.

5 Supplement to the Petition of Charter Fiberlink MA-CCO, LLC for Arbitration of an Amendment to the Interconnection Agreement Between Verizon Massachusetts Inc. and Charter Fiberlink MA-CCO, LLC Pursuant to Section 252 of the Communications Act of 1934, as Amended filed July 26, 2006 ("Charter's Supplement").

6 Reply of Verizon Massachusetts to Charter's Supplement to its Arbitration Petition filed August 2, 2006 ("Verizon MA Reply").

more than a month after the deadline for filing its petition, which petition should have identified ***all*** of the open and closed issues. Verizon also demonstrated that Charter and Verizon had proposed to each other identical contract language with respect to each issue identified in Charter's Supplement. *See* Verizon MA Reply at 1-2. The Parties had closed all of these new issues by their exchange of identical contract language. During the negotiations, neither party withdrew its final proposed contract language or indicated that issues were open despite the parties' apparent agreement on contract language governing such issues.

Argument

Section 252 of the Act establishes a negotiation process by which a competing carrier and incumbent carrier first attempt to negotiate an interconnection agreement between themselves. For any issues that were not closed during the negotiations, the Act allows a carrier to petition for arbitration. After a negotiation period of 135 to 160 days, Section 252(b)(1) allows a carrier to petition for arbitration of "any open issues." 47 U.S.C. § 252(b)(1).

The "open issues" that are subject to arbitration are defined by the parties' positions in the negotiations. In fact, Section 252(b)(2) requires the petitioner to submit with its petition all relevant documents concerning: "(i) the unresolved issues; (ii) the position of each of the parties with respect to those issues; and (iii) any other issue discussed and resolved by the parties." 47 U.S.C. § 252(b)(2). This statutory requirement clearly applies to the issues and the parties' positions *in the negotiations*. Otherwise, if a petitioner could ignore the positions it has taken and the terms it has agreed to in the negotiations and take wholly new or contrary positions in its petition, the petitioner could not possibly determine which issues are "unresolved," nor could it provide documentation on the position of the opposing party. Section 252(b)(2) makes sense only if it is referring to the issues that remain open from the negotiations. Any other

interpretation not only ignores the language of the statute but would defeat the purpose of requiring prior negotiations in the first place.

The Ruling of the Arbitrator allows Charter to arbitrate every issue in its Petition for Arbitration and its Supplement. This Ruling erases the term "open" right out of the statute and renders the negotiations meaningless. None of the rationales on which the Ruling is based have merit.

The first rationale articulated in the Ruling is that "[i]n order to determine that the issues were not, in fact, discussed by the parties or that the issues were discussed and resolved, the Department's role would be widened to require investigation of every communication that occurred between the parties prior to the filing of the Petition to ascertain whether an issue was raised in some context." Ruling at 4. Such an investigation would not be necessary in this case.

The Department can determine the closed issues simply by examining the final contract proposals exchanged by the parties during the negotiations. Charter provided its final proposed fiber meet amendment to Verizon on March 16, 2006, and Verizon provided its final proposed fiber meet amendment to Charter on May 8, 2006. The Department need only compare these two documents, as Verizon MA did in its motion to dismiss. Where these documents contain identical language or nearly identical language, the issue raised by Charter is closed.[7] The Department need not review the entire history of the parties' negotiations.

The second rationale described in the Ruling is that there is nothing "to prevent one party from reconsidering its stance on a particular issue" and that "even though some issues have been resolved, one or both of the parties view such issues as 'open' until all of the issues are resolved

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[7] The minor differences between the parties' respective proposals either do not relate directly to any issue raised by Charter or reflect a much narrower issue than the issue raised by Charter.

and agreed to in writing." Ruling at 4. According to the Ruling, until the parties file an interconnection agreement, "the Arbitrator cannot find that the issues raised by Charter have been previously resolved." Ruling at 5. This rationale cannot be squared with the Act.

While a party to a negotiation is certainly able to reconsider its stance, it must communicate its new stance to the other party during the negotiations. Each party must know which issues are open and which issues are closed in order to be able to prepare an arbitration petition. *See* 47 U.S.C. § 252(b)(2). One party cannot lead the other party to believe that an issue is closed while secretly harboring its own belief that the issue is still open, or close an issue, but then have misgivings about the resolution and re-open the issue in the arbitration.

Nor can it be the case that every issue remains open until the parties have signed their agreement or amendment. The Act requires the parties to negotiate in good faith and such negotiations must identify which issues are closed and which issues are open. If a petitioner were free to create in its petition any issue at all – including issues raised and resolved in negotiations or never raised in the first place – the term "open" would have no meaning and be read out of the statute.

Nothing in the Act authorizes the petitioner to re-open an issue in its arbitration petition after it has closed the issue in negotiations. Again, the Arbitrator's interpretation of the Act renders the negotiation requirement a nullity. Under the Ruling's approach, the filing of an arbitration petition would void all of the settlements the parties had reached in negotiations. If, for example, the parties started negotiations with 50 open issues and resolved 49 before the end of the Act's negotiation period, a party could nevertheless re-open all 50 issues (as well as raise any number of new issues) once an arbitration petition was filed. Obviously, parties will have little incentive to engage in genuine negotiations if they know that either party may unilaterally

repudiate, via its arbitration filing (or during the ensuing arbitration proceedings), any settlements made during negotiations.

The third rationale set forth in the Ruling is that "[a] determination of those issues that are resolved in arbitration is not based on whether the proposed contract language presented by the Petitioner in its Petition for Arbitration matches the most recent version discussed by the parties." Ruling at 5. According to the Ruling, "the focus is on whether the petitioning party believes that the issues have been resolved." *Id.* Again, this rationale lacks merit.

The purpose of the negotiations was to reach agreement on a fiber meet amendment to the parties' interconnection agreement. Where the contract language Charter proposed to Verizon was the same contract language that Verizon proposed to Charter, it defies logic and negotiating convention to suggest that there could still be an open issue with respect to that language.

In fact, Charter's own actions demonstrate that issues are inextricably linked to contract language. Where Charter raised new issues for the first time in its Petition, it also proposed new contract language in its Petition specifically to address those issues. And where Charter raised even more new issues for the first time in its Supplement, Charter again proposed new contract language in its Supplement to address those issues.

Finally, the Ruling finds that the three new issues Charter raised in its Supplement were permissible because the Arbitrator requested that Charter file a supplemental petition to "provide additional discussion of the technical issues referred to in Charter's Petition." Ruling at 5. But Charter did not simply clarify the technical issues raised in its Petition. Instead, Charter amended its Petition by adding three new issues that were never mentioned in its Petition or

during the parties' negotiations. The Act does not allow a petitioner to raise additional issues for arbitration after the deadline for filing its petition for arbitration.[8]

Under the Act, "[a] party that petitions a State commission under paragraph (1) shall, *at the same time as it submits the petition*, provide the State commission all relevant documentation concerning - (i) the unresolved issues; (ii) the position of each of the parties with respect to those issues; and (iii) any other issue discussed and resolved by the parties." 47 U.S.C. 252(b)(2)(emphasis supplied). The three issues Charter first identified in its Supplement were not identified in Charter's Petition. In fact, in support of these three new issues, Charter proposed new contract language that changed the contract language Charter had included with its Petition. In other words, Charter had indicated in its Petition that these issues were resolved, but then changed its mind 34 days later to raise them for the first time in its Supplement. The Act does not allow the petitioner to raise new issues for arbitration even one day (much less more than a month) after it files its arbitration petition.

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[8] In its response to Charter's Petition, Verizon MA did not raise additional issues because it had filed a motion to dismiss and resolution of that motion would affect the new issues to be raised by Verizon MA. If the Department determined that Charter could not propose new contract language with its petition, Verizon MA would have identified additional issues based on the final draft fiber meet amendment Charter provided during negotiations. On the other hand, if the Department determined that Charter could propose new contract language with its petition, Verizon MA would have identified additional issues based on Charter's new draft fiber meet amendment submitted with Charter's Petition. During the Procedural Conference on July 20, 2006, the Arbitrator indicated she would deny Verizon MA's motion to dismiss and allowed Verizon MA to file a supplemental response to Charter's petition to address the new issues raised by the new contract language Charter proposed with its petition. As a result, it was necessary for Verizon MA include new issues in its supplement filed on July 26, 2006.

Conclusion

The Department does not have the discretion to ignore or eliminate the Act's requirement for the parties to negotiate issues for the statutory period before seeking arbitration on those issues. Therefore, the Department should reverse the Arbitrator's Ruling and dismiss Charter's Arbitration Petition and Supplement.

Respectfully submitted,

VERIZON MASSACHUSETTS

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